2018 IL App (2d) 150618-U
No. 2-15-0618
Order filed June 4, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JUAN F. BLANCO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 09-CF-198 Honorable Joseph G. McGraw, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Hudson and Justice Spence concurred in the judgment.

ORDER

Held: The defendant's postconviction petition was properly dismissed at the first stage.

¶ 1 Following a jury trial, the defendant, Juan F. Blanco, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)) and concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2008)). He was sentenced to a total of 47 years' imprisonment. This court affirmed his conviction on direct appeal. See *People v. Blanco*, 2014 IL App (2d) 120104-U. On May 8, 2015, the defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)). On May 29, 2015, the trial court

dismissed the petition as frivolous and patently without merit. The defendant appeals from this order. We affirm.

¶ 2 BACKGROUND

¶ 3 On February 11, 2009, the defendant was charged by indictment with the first degree murder of the victim (720 ILCS 5/9-1(a)(1) (West 2008)). The charges alleged that the defendant had shot the victim to death. The charges further alleged that the defendant had concealed the victim's homicide (720 ILCS 5/9-3.1(a) (West 2008)).

¶ 4 Between May 23 and June 2, 2011, the trial court conducted a jury trial. The victim's sister, Victoria Rojas, was married to the defendant at the time of the murder. Rojas described her relationship with the defendant as "bad." The defendant and Rojas had not lived together since October 2008. Shortly after the defendant moved out, the victim moved in with Victoria. Ramona Simmons, the victim's girlfriend, testified that the victim owned a white Intrepid, which he regularly parked outside of her residence. In either December 2008 or in January 2009, she gave him a tarp to put over the windshield to protect it from ice and snow.

¶ 5 On the morning of January 16, 2009, the victim's body was discovered in the back seat of his car at Gem Suburban Trailer Park in Rockford. Deputy Tim Speer, a forensic technician, arrived around 9:40 a.m., and processed the scene for evidence. Speer took photographs of the scene and of the tread patterns on all of the shoes of those who had been near the car while the victim's death was being investigated. Speer took photographs of footwear impressions he found in the snow by the driver's door and the rear door on the driver's side of the Intrepid.

¶ 6 An expert in the field of footwear examinations determined that the victim's shoes were not capable of making those impressions. The shoe impressions were consistent with Nike Air shoes, size 10. However, no positive identifications could be made.

¶ 7 Speer examined the interior of the victim's vehicle. The tarp that Simmons had given the defendant was folded on the passenger seat. A latent fingerprint of the defendant's was found on the tarp. Speer found a deformed bullet behind the driver's seat on the rear floorboard. This bullet and one later recovered during the autopsy were determined by a firearm expert to have been fired from the same gun, either a 9mm or a .38 caliber gun. Speer found a footwear impression on the driver's side carpet close to the pedals. He photographed it and took a "hinge lift" of it. The same expert in the field of footwear determined that the "hinge lift" was consistent with Nike Air shoes. The victim's shoes were determined to have not made the impression. Speer found what he believed to be a bloody shoe print, around where the victim's head would have been on the back passenger door of the Intrepid. The shoe print did not match the victim's shoes or Nike Air shoes.

¶ 8 The victim worked at Haldex Hydraulics Corporation. On January 15, 2009, he worked from 5:49 a.m. to 2:37 p.m. Haldex had eight security cameras for the surveillance of its property. Detective Bob Juarez watched some of the video from these cameras and noticed that, on January 15, 2009, between 1:31 p.m. and 1:35 p.m., a dark-colored Land Rover came from the west into the parking lot. Juarez believed that the vehicle was the defendant's because, just like the defendant's Land Rover, the Land Rover in the video had a very distinctive paint discoloration on the top of the cab.

¶ 9 On January 16, 2009, the defendant was arrested. The State presented evidence that the defendant frequently worked on his Land Rover at Marvin's Tire Shop in Rockford. He was at Marvin's around 3 p.m. on January 14, 2009. He was also seen cleaning his Land Rover at Marvin's on January 16, 2009. On January 21, 2009, the police searched the garbage dumpster behind Marvin's. The police discovered a bag that was linked to the defendant through a US

Bank receipt and a Walgreen's receipt that were in the bag. Also in the bag was a pair of black and white Nike shoes (that was also independently linked to the defendant) and a shell casing. No blood was found on the shoes. A firearm expert determined that the shell casing was from a 9mm fired cartridge case.

¶ 10 Dr. Mark Peters testified that he performed the autopsy on the victim's body. In the victim's right hand was a single blonde hair about two inches long. It was collected as evidence. Jamie Jett, a forensic scientist, compared the single hair found in the victim's right hand with hair standards from the defendant. The hair was a blonde Caucasian head hair and did not come from the defendant.

¶ 11 At the close of the trial, the jury found the defendant guilty of first degree murder and concealment of a homicidal murder. Following the denial of his posttrial motion, the trial court sentenced the defendant to a total of 47 years' imprisonment. The defendant thereafter filed a timely notice of appeal.

¶ 12 On appeal, in addition to other arguments, the defendant challenged the sufficiency of the evidence. The defendant also argued that the trial court erred when it held that defense counsel failed to make a *prima facie* case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), where the State used two peremptory challenges to excuse the only eligible African-American venire persons from the jury. On March 31, 2014, we found the arguments raised by the defendant on direct appeal to be without merit and affirmed the defendant's conviction and sentence. *Blanco*, 2014 IL App (2d) 120104-U.

¶ 13 On May 8, 2015, the defendant filed a *pro se* postconviction petition, raising 11 claims of error. Relevant to this appeal, the defendant argued that trial counsel was ineffective in failing to (1) move to suppress evidence recovered from Marvin's Tire & Auto because that evidence was

found as a result of statements made to police that were subsequently suppressed and was thus "fruit of the poisonous tree"; (2) hire a DNA expert to test the hair found in the victim's hand; (3) lay a proper foundation for the admission of a photograph of the hair found in the victim's hand; and (4) investigate the shell casing found at Marvin's. The defendant also argued that appellate counsel was ineffective in failing to (1) raise the argument of "actual innocence" on direct appeal; and (2) argue that the trial court erred in not allowing time for jurors to respond when they were questioned about the *Zehr* principles during *voir dire*. Finally, the defendant argued that his constitutional rights were violated because Winnebago County did not provide a jury that was made up of a fair cross section of its community. On May 29, 2015, the trial court entered an order dismissing the defendant's *pro se* petition at the first stage of postconviction proceedings because it was frivolous and patently without merit. The defendant filed a timely notice of appeal.

¶ 14 On March 14, 2017, the Office of the State Appellate Defender (OSAD) filed an appellant brief, which argued only the issue as to whether the jury pool was made up of a fair cross-section of the community. Thereafter, the defendant requested that the appellate defender file a motion to withdraw so that he could proceed *pro se*. On April 7, 2017, OSAD filed a motion to withdraw. On that same date, the defendant filed a *pro se* motion to grant the motion to withdraw and to allow him additional time to file a *pro se* brief "wherein he will have all of his appellate issues reviewed instead of only (1) briefed by his appellate attorney." On April 13, 2017, this court entered an order allowing OSAD's motion to withdraw and granting the defendant's *pro se* motion for extension of time to file his *pro se* brief. In that order, it was also stated that "[t]he appellant's initial brief shall remain filed." On April 25, 2017, the defendant filed his "supplemental *pro se* brief and argument."

¶ 15 ANALYSIS

¶ 16 On appeal, the defendant argues *pro se* that the trial court erred in dismissing his postconviction petition as frivolous and patently without merit. At the outset, we note that the defendant has filed a motion to strike portions of the appellee brief. The motion was ordered to be taken with the case. In that motion, the defendant objects to argument raised by the State, in its jurisdictional statement, wherein the State objected to this court's acceptance of both OSAD's appellant brief and the defendant's *pro se* supplemental brief. The defendant requests that we strike this portion of the State's jurisdictional statement.

¶ 17 Rule 341(h)(4) requires a statement of jurisdiction setting forth the supreme court rule or other law that confers jurisdiction upon the reviewing court. Ill. S. Ct. R. 341(h)(4) (eff. July 1, 2008). We agree with the defendant that it was not appropriate for the State to object to our consideration of OSAD's appellant brief in its jurisdictional statement, as it does not affect our jurisdiction. We entered an order on April 13, 2017, which stated that OSAD's brief would remain filed. The State could have filed a motion to reconsider with its objection at that time. Moreover, while the State has cited authority for the proposition that a defendant may not alternate between being represented by counsel and proceeding *pro se*, the State has not cited any authority that precludes a defendant from adopting former counsel's brief and filing a supplemental *pro se* brief, as occurred in this case. Accordingly, we grant the defendant's motion to strike the portion of the State's jurisdictional statement arguing that we should not consider OSAD's appellant brief. We now turn to the merits of this appeal.

¶ 18 In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition (725 ILCS 5/122-1 *et seq.* (West 2016)). *People v. Jones*, 213 Ill. 2d 498, 503 (2004). At the first stage, "the trial court, without input from the State, examines the

petition only to determine if [it alleges] a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit." (Emphasis omitted.) *People v. Phyfiher*, 361 Ill. App. 3d 881, 883 (2005). Section 122-2.1 of the Act directs that, if the trial court determines that the petition is frivolous or patently without merit, it shall dismiss it in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2016); *People v. Torres*, 228 Ill. 2d 382, 394 (2008).

¶ 19 If a petition is not dismissed at the first stage, it proceeds to the second stage, where counsel is appointed and the *pro se* petition may be amended. *People v. Andrews*, 403 Ill. App. 3d 654, 658 (2010). At the second stage, the State has the option to either answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2016). The proceedings advance to the third stage if the State answers the petition or the trial court denies the State's motion to dismiss. At the third stage, the trial court conducts an evidentiary hearing. *Phyfiher*, 361 Ill. App. 3d at 883-884.

¶ 20 In this case, the trial court dismissed the defendant's *pro se* petition at the first stage, concluding that the defendant's claims were frivolous and patently without merit. A *pro se* petition seeking postconviction relief under the Act may be summarily dismissed as "frivolous or *** patently without merit" pursuant to section 122-2.1(a)(2) only if the petition has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id.* An example of an indisputably meritless legal theory is one which is completely contradicted by the record. *Id.* Fanciful factual allegations include those which are fantastic or delusional. *Id.*

¶ 21 To survive summary dismissal, a petition need present only the "gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The "gist" standard is "a low

threshold." *Id.* To set forth the "gist" of a constitutional claim, the petition "need only present a limited amount of detail" (*id.*) and thus need not set forth the claim in its entirety. *People v. Edwards*, 197 Ill. 2d 239, 244-45 (2001). A *pro se* petition should be given a liberal construction and should be reviewed "'with a lenient eye, allowing borderline cases to proceed.'" *Hodges*, 234 Ill. 2d at 21 (quoting *Williams v. Kullman*, 722 F. 2d 1048, 1050 (2d Cir.1983)). We review *de novo* the first-stage dismissal of a postconviction petition. *People v. Swamynathan*, 236 Ill. 2d 103, 113 (2010).

¶ 22 The defendant's first contention, set forth in OSAD's appellant brief, is that he stated the gist of a constitutional claim that the jury pool from which his jury was chosen was not made up of a fair cross-section of the community. In his *pro se* petition, the defendant argued, specifically, that his constitutional rights were violated where "Winnebago County did not provide a jury made up of a fair cross-section of its population." The defendant further stated that "[t]his claim was raised on direct appeal" but that he would add facts that were outside the record on direct appeal. The defendant then stated that, in Winnebago County, 12.7% of the population was African American and 11.7% was Hispanic or Latino. The defendant noted that peremptory challenges excluded the two African American venire members from jury service and he questioned why there were so few African Americans and Latinos represented in the venire pool. The defendant then concluded that, "[g]iven the make-up of the community, it [was] unconstitutional to provide him an all white jury." The only case cited by the defendant was *Batson v. Kentucky*, 476 U.S. 79, 96 (1986).

¶ 23 The State argues that the issue is *res judicata* because the defendant raised a *Batson* challenge on direct appeal, which this court found to be without merit. Under the doctrine of *res judicata*, all issues previously decided are barred from being relitigated. *People v. Blair*, 215 Ill.

2d 427, 443 (2005). In *Batson*, the Supreme Court held that the equal protection clause of the fourteenth amendment prohibited the State from using peremptory challenges to exclude a juror solely on account of race. *Batson*, 476 U.S. at 96. On direct appeal, the defendant argued that the State's use of peremptory challenges to exclude African Americans from his jury was improper. In his *pro se* petition, the defendant argued that his jury did not represent a fair cross-section of the community. Although this is related to the State's use of peremptory challenges, it is a slightly different argument and we decline to hold that it is barred by *res judicata*. *Blair*, 215 Ill. 2d at 443. Nonetheless, the trial court did not err in finding this issue frivolous or patently without merit. In his *pro se* petition, the defendant argued that his jury was not made up of a fair cross-section of the community and that it was unconstitutional for him to have "an all white jury." However, it is well settled that a petit jury need not represent a fair cross-section of the community. *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986).

¶ 24 In so ruling, we note that OSAD argued that the defendant was raising a challenge to the makeup of the jury pool, not to the makeup of the petit jury. See *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (the sixth amendment to the U.S. Constitution guarantees the defendant's right to a petit jury drawn from a fair cross-section of the community). However, in an appeal from the summary dismissal of a postconviction petition, a petitioner and his postconviction-appellate counsel may not raise an issue for the first time that was not included in the petition and that was never considered by the trial court. *People v. Cathey*, 2012 IL 111746, ¶ 21. While postconviction claims may be raised inartfully and should be construed liberally, the "gist" of those claims (see *Hodges*, 234 Ill. 2d at 11), under the plain language of the Act must be "'clearly set forth'" in the petition itself. *Id.* at 9 (quoting 725 ILCS 5/122-2 (West 2016)).

¶ 25 In this case, the defendant's postconviction petition simply did not raise a challenge to the makeup of the jury pool. The defendant argued that his petit jury was not made up of a fair cross-section of the community and complained that he had an "all white jury." The defendant cited only to *Batson*, for the proposition that race could not be considered as a factor during jury selection. The defendant never cited to *Taylor*, 419 U.S. at 528, or to *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (setting forth the requirements to establish a *prima facie* violation of the jury pool fair cross-section requirement). The defendant's *pro se* petition did not clearly set forth the argument that OSAD is now attempting to present on appeal, it was not considered by the trial court, and we therefore need not address it. *Cathey*, 2012 IL 111746, ¶ 21.

¶ 26 Even if the trial court interpreted the defendant's *pro se* petition as raising a fair cross-section challenge to his jury pool, we would still affirm the dismissal of the claim. The sixth and fourteenth amendments guarantee a defendant the right to a petit jury drawn from a fair cross-section of the community. U.S. Const., amends. VI, XIV; *People v. Omar*, 281 Ill. App. 3d 407, 414 (1996). In order to establish a *prima facie* violation of the fair cross-section requirement, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process. *Duren*, 439 U.S. at 364; *Omar*, 281 Ill. App. 3d at 414.

¶ 27 In OSAD's appellant brief, it argues that there were not enough African Americans in the jury pool. A defendant can raise a fair-cross section challenge to the venire even if he does not belong to the group alleged to be excluded. *People v. Flores*, 193 Ill. App. 3d 501, 507 (1990). The defendant argues that 12.7% of the population of Winnebago County is African American

and that only 6.4% of the jury pool was African American. This is a disparity of 6.3%. However, disparities of less than 10% are insufficient to demonstrate unfair or unreasonable representation of African Americans on the venire unless the defendant also ties that disparity to something other than coincidence. *Omar*, 281 Ill. App. 3d at 415-16. The defendant has not offered any explanation other than coincidence, and he has thus failed to offer any evidence in support of the second prong of the *Duren* test. *Id.*

¶ 28 The defendant noted in his petition that the City of Rockford has an African American population of 20.5%. This does not create a disparity greater than 10%. The community in jury selection challenges is coextensive with the geographic area from which the court or legislature ordered the venire to be drawn. *People v. Peeples*, 155 Ill. 2d 422, 451-52 (1993). According to the local court rules of the 17th Judicial Circuit, of which Winnebago County is part, the jury venire is chosen from eligible voters and drivers license holders residing in Winnebago County. 17th Judicial Cir. Ct. R. 2.05 (Jan. 16, 2007). As such, the Rockford demographics are inapposite and the trial court did not err in finding this claim frivolous and patently without merit.

¶ 29 The defendant's second contention on appeal is that the trial court erred in dismissing his claim for ineffective assistance of trial and appellate counsel for failure to file a motion to suppress certain evidence. The defendant is specifically referring to a 9mm shell casing, a pair of Nike tennis shoes, a Planters cashew wrapper, and photos of various receipts. These items were found in a bag in a garbage dumpster at Marvin's. The defendant argues that since his statements to the police were suppressed, and those statements were what led the police to the evidence found at Marvin's, that his counsel should have filed a motion to suppress the foregoing evidence as "fruit of the poisonous tree."

¶ 30 To determine whether a defendant was denied the effective assistance of counsel, we apply the two-prong test developed by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland*, 466 U.S. at 687. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000). At the first stage of postconviction proceedings, however, a defendant need only establish that it is arguable counsel's performance fell below an objective standard of reasonableness and he arguably was prejudiced as a result. *People v. DuPree*, 397 Ill. App. 3d 719, 737 (2010).

¶ 31 To satisfy the deficient-performance prong of *Strickland*, a defendant must show that his counsel's performance was so inadequate that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. *People v. Erickson*, 183 Ill. 2d 213, 223 (1998). Counsel's performance is measured by an objective standard of competence under prevailing professional norms. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance (*Strickland*, 466 U.S. at 689), and, as a general rule, matters of trial strategy, such as whether to file a motion to suppress, are immune from claims of the ineffective assistance of counsel (*People v. Fernandez*, 162 Ill. App. 3d 981, 987 (1987)). Nevertheless, where such a motion is appropriate, the failure to file a motion to suppress will constitute ineffective assistance. See, *e.g.*, *Fernandez*, 162 Ill. App. 3d at 988-89.

¶ 32 To establish the prejudice prong of *Strickland* in the context of a motion to suppress, a defendant must show that a reasonable probability exists both that the motion would have been granted and that the outcome of the trial would have been different had the evidence been suppressed. *People v. Orange*, 168 Ill. 2d 138, 153 (1995). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Erickson*, 183 Ill. 2d at 224 (quoting *Strickland*, 466 U.S. at 694).

¶ 33 In the present case, the defendant has failed to state the gist of a constitutional claim because there is no reasonable probability that a motion to suppress the evidence found at Marvin's would have been granted. The "fruit of the poisonous tree" doctrine is only applicable when evidence is obtained in violation of a constitutional right. *People v. Gonzalez*, 313 Ill. App. 3d 607, 615 (2000). While evidence discovered by virtue of a statement obtained in violation of a constitutional right must be suppressed, the right to receive *Miranda* warnings is not a constitutional right. *Id.* Rather, the right to receive *Miranda* warnings "is a prophylactic rule designed to protect a suspect's constitutional right against compelled self-incrimination." *Id.*

¶ 34 In this case, the trial court granted the motion to suppress the defendant's statements due to a *Miranda* violation. The trial court also specifically found that the defendant's statements were voluntary and were not the result of threats, coercion, or promises. Accordingly, the defendant's statements were not obtained in violation of a constitutional right (*id.*) and there was no reasonable probability that the trial court would have granted a motion to suppress the evidence at issue. As a motion to suppress the evidence would have been futile, the trial court did not err in finding this claim to be frivolous and patently without merit. *People v. Givens*, 237

Ill. 2d 311, 331 (2010) (the failure to file a motion to suppress does not establish ineffective assistance of counsel when the motion would have been futile).

¶ 35 The defendant's third contention on appeal is that he presented the gist of a constitutional claim that his trial counsel was ineffective in failing to hire a DNA expert to test the hair found in the victim's hand. The record indicates that defense counsel did hire a DNA expert. During the investigation, swabs were taken from inside the victim's vehicle for DNA testing purposes. The State filed a motion to consume some of these DNA samples, meaning that DNA testing of the evidence would prevent any further testing of that evidence. Defense counsel moved to, and was allowed, to hire a DNA expert to observe the testing. Additionally, after receiving a report of all the DNA evidence, defense counsel stated that he would look at the report and decide whether to hire a DNA expert. Accordingly, the record indicates that defense counsel considered the possibility of DNA evidence, but ultimately decided not to have the hair tested by a DNA expert. This makes sense because the defendant's theory was that the hair belonged to the victim's real killer. It was possible that DNA testing could have resulted in evidence that refuted this theory and hindered the defendant's defense. For example, had a DNA test identified the donor of the hair, it could have been someone who worked with the victim or a friend that was regularly in the victim's vehicle. Accordingly, the failure to have the hair tested for DNA was a matter of trial strategy and does not present an arguable claim of ineffective assistance of counsel. See *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004) (matters of trial strategy are immune from ineffective assistance of counsel claims); *Fernandez*, 162 Ill. App. 3d at 987.

¶ 36 Moreover, even if the failure to hire a DNA expert to test the hair found in the victim's hand was arguably deficient performance, the defendant has not established any arguable prejudice. At trial, defense counsel called Jett to testify regarding the hair found in the victim's

hand. Jett testified that the hair was a Caucasian blonde hair and that it was not the defendant's hair. In closing argument, defense counsel argued that the hair was affixed to the defendant's hand during a confrontation with the killer, there was no evidence of any other blonde hair in the car, and that there were no witnesses that might have innocently left a blonde hair in the victim's car. Accordingly, the lack of testing allowed defense counsel to emphasize that the hair in the victim's hand was not the defendant's. If DNA testing had been completed, it could have hindered the defense if the testing revealed an innocent donor. The defendant has thus failed to establish any arguable prejudice. See *People v. Scott*, 2011 IL App (1st) 100122, ¶ 31 (reviewing court affirmed first-stage dismissal of postconviction petition alleging ineffective assistance for the failure to pursue DNA testing because the defendant had not established any prejudice as it was not known whether any test results would be exculpatory).

¶ 37 The defendant's next contention is that his trial counsel was ineffective in failing to lay a proper foundation for the admission of a photograph of the blonde hair found in the victim's right hand. The defendant further argues that the ineffectiveness was compounded by the fact that the photograph thus could not be sent to the jury room during deliberations. The defendant has failed to state the gist of a meritorious claim that his counsel's performance fell below an objective standard of reasonableness in this regard or that the failure to lay a proper foundation resulted in any prejudice. While the photograph of the hair was not admitted, the actual hair was admitted and its evidentiary value was argued. There was testimony that the hair was a Caucasian blonde hair and that it did not belong to the defendant. In closing, defense counsel argued that the hair belonged to the person who committed the murder, which was not the defendant. Thus, the failure to admit the photograph and its absence from jury deliberations was not prejudicial to the defendant's case.

¶ 38 The defendant also argues that it was improper to summarily dismiss his claim of actual innocence. Postconviction petitioners may assert a claim of actual innocence based on newly discovered evidence. *People v. Montes*, 2015 IL App (2d) 140485, ¶ 21. The evidence in support of such a claim must be new, material, noncumulative, and, critically, of a character so conclusive that it would probably change the result on retrial. *Id.* In this case, the evidence that the defendant relies on is the tarp, the shell casing, a bloody notebook found in the victim's car, and a gold/tan vehicle in the Haldex parking lot. However, none of these are newly discovered evidence. Rather, this evidence was known and testimony about it was provided at trial. There was testimony about the notebook and that it was tested for finger prints. There was also evidence of a gold/tan car leaving the Haldex parking lot about the same time as the victim. As such, the defendant failed to state the gist of a claim of actual innocence as he failed to identify any newly discovered evidence.

¶ 39 To the extent the defendant argues that appellate counsel was ineffective in failing to raise a claim of actual innocence on direct appeal, this also fails to state the gist of a meritorious claim. Although claims of actual innocence may be raised at any time, a postconviction petition is the appropriate place to assert claims of actual innocence. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). As claims of actual innocence, by definition, are based on newly discovered evidence that was not considered at trial, such claims cannot be considered on direct appeal as a reviewing court is unable to consider evidence *de hors* the record. *People v. Mitchell*, 189 Ill. 2d 312, 345 (2000). Moreover, as noted, the defendant has failed to provide any newly discovered evidence.

¶ 40 The defendant next argues that he stated the gist of a claim of ineffective assistance of counsel for failing to investigate the shell casing found at Marvin's. The defendant's argument

relates to the State's sixteenth motion *in limine***,** in which the State sought to prohibit evidence that the shell casing found in the Marvin's dumpster was fired from the same gun as two shell casings in a different shooting being investigated by the Rockford police department. The trial court granted that motion without objection. In his postconviction petition, the defendant argued that counsel was ineffective in not investigating the other shooting. Specifically, the defendant argued that counsel never investigated whether the shooter and the weapon in the other case were in the hands of the police at the time the victim was killed. The defendant noted that he was never charged or investigated for any other crimes. The defendant argued that investigating the shell casing could have led to the discovery of exculpatory evidence, or material that was required to be produced under *Brady v. Maryland*, 373 U.S. 83 (1963).

¶ 41 The defendant has failed to state the gist of a constitutional claim for ineffective assistance of counsel in not investigating the shell casing and its relation to the other shooting. The defendant's argument is based on pure conjecture. The defendant did not provide any supporting evidence of the existence of any exculpatory material or of a *Brady* violation. See 725 ILCS 5/122-2 (West 2016) (postconviction claims must be supported by affidavit or other evidence). Because the basis of this claim for ineffective assistance is based on nothing more than conjecture, it fails to allege the gist of a constitutional claim and was properly dismissed as frivolous and patently without merit. *People v. Bew*, 228 Ill. 2d 122, 135-36 (2008) (*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice).

¶ 42 The defendant's final contention is that he stated the gist of a constitutional claim for ineffective assistance in that appellate counsel failed to argue on direct appeal that the trial court had not adhered to the four Rule 431(b) *Zehr* principles (*People v. Zehr*, 103 Ill. 2d 472, 477

(1984)). Specifically, the defendant alleges that the trial court proposed the *Zehr* principles but failed to require verbal responses from an entire panel of prospective jurors.

¶ 43 In *Zehr*, our supreme court held it is "essential to the qualification of jurors in a criminal case" that they know a defendant: (1) is presumed innocent; (2) is not required to offer any evidence on his own behalf; (3) must be proven guilty beyond a reasonable doubt; and (4) his failure to testify on his own behalf cannot be held against him. *Id.* Rule 431(b) imposes a *sua sponte* duty on trial courts to ask potential jurors, individually or in a group, whether they understand and accept these principles. *People v. Haynes*, 408 Ill. App. 3d 684, 692 (2011).

¶ 44 Despite the defendant's contention to the contrary, our own review of the record reveals that all 12 jurors and the two alternate jurors were each asked about the four *Zehr* principles and they all affirmatively indicated to the trial court that they understood those principles. The record affirmatively refutes the defendant's contention that a group of jurors was not asked about the *Zehr* principles. This contention is thus frivolous and patently without merit.

¶ 45 CONCLUSION

¶ 46 For the reasons stated, the judgment of the circuit court of Winnebago County, dismissing the defendant's *pro se* postconviction petition as frivolous and patently without merit, is affirmed. As part of our judgment, we grant the State's request that the defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 47 Affirmed.